IN THE SUPREME COURT OF IOWA

Supreme Court No. 15-0695
Polk County No. LACL124195

CHRISTOPHER J. GODFREY,

PLAINTIFF-APPELLANT,

v.

STATE of IOWA; TERRY BRANSTAD, Governor of the State of Iowa, individually and in his official capacity; KIMBERLY REYNOLDS, Lieutenant Governor of the State of Iowa, individually and in her official capacity; JEFF BOEYINK, Chief of Staff to the Governor of the State of Iowa, individually and in his official capacity; BRENNA FINDLEY, Legal Counsel to the Governor of the State of Iowa, individually and in her official capacity; TIMOTHY ALBRECHT, Communications Director to the Governor of the State of Iowa, individually and in his official capacity; and TERESA WAHLERT, Director, Iowa Workforce Development, individually and in her official capacity,

DEFENDANTS-APPELLEES.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HONORABLE BRAD McCALL

APPELLANT'S BRIEF

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V. ROUTING STATEMENT

The Iowa Supreme Court should retain jurisdiction of this matter as it presents a substantial issue of first impression with respect to whether the Iowa Constitution provides an individual remedy for damages when a citizen's constitutional rights pursuant to the Iowa Constitution are violated by state actors. *See,* Iowa R. App. P. 6.1101(2)(c). The ultimate answer to this question will have substantial implications, as Plaintiff's due process and equal protection rights and his access to an adequate remedy for violations thereof are at issue. *See*, Iowa R. App. P. 6.1101(2)(a).

This case also presents a fundamental and urgent issue of broad public importance requiring prompt and ultimate determination by the Supreme Court, in that the determination of an individual's right to damages for state constitutional violations pursuant to the state constitution itself will have a profound effect on the ability of those who are injured by governmental employees, including Plaintiff, to proceed with legal claims against the individuals responsible for their injuries. *See*, Iowa R. App. P. 6.1101(2)(d). Plaintiff also believes this issue presents a substantial question of enunciating or changing legal principles, in that this Court must speak definitively, in light of the recent decision by the Iowa Court of Appeals in *Conklin v. State*, 2015 WL 1332003 (Iowa Ct. App.) as to whether such a remedy will be acknowledged and protected by our judiciary. *See*, Iowa R. App. P. 6.1101(2)(f). The Iowa Supreme Court has granted interlocutory review of this matter. (5/28/15 Supreme Court Order, App. 170).

VI. STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

On November 13, 2014, Plaintiff filed a Third Amended Petition against Defendants. (Third Amended Petition, App. 1). The Third Amended Petition alleges that: (1) Plaintiff was deprived of property rights

protected under the Iowa Constitution, Article I, § 9 by all Defendants without due process for strictly partisan political purposes and/or because of his sexual orientation (Count VI); (2) that Plaintiff was deprived of liberty interests protected under the Iowa Constitution, Article I, § 9 by all Defendants without due process by publicly and falsely claiming that their illegal and unreasonable demands for his resignation and ultimate reduction in pay were due to Plaintiff's poor work performance (Count VII); that Plaintiff was deprived of equal protection of the laws, guaranteed by the Iowa Constitution, Article I, § 6 by the State of Iowa based upon his sexual orientation (Count VIII); and (4) that Plaintiff was deprived of equal protection of the laws guaranteed by the Iowa Constitution, Article I, § 6 by all Defendants due to their establishment, maintenance and/or enforcement of policies that treat homosexual appointed state officers differently than heterosexual appointed state officers (Count IX). *Id.*

On December 13, 2014, Defendants filed a Motion for Partial Summary Judgment seeking to dismiss Plaintiff's aforementioned constitutional claims. (Ds' Motion for Partial Summary Judgment on Counts VI Through IX, App. 72). Plaintiff resisted Defendants' motion, arguing that the harm Plaintiff suffered consists of more than civil rights

violations pursuant to the Iowa Civil Rights Act, that the Iowa General Assembly is not the exclusive guarantor of the rights enumerated and implied by the Iowa Constitution, that no binding decision exist regarding the right to recover damages for equal protection and due process violations under the Iowa Constitution and that there is persuasive case authority for recognizing a private cause of action for damages under the Iowa Constitution. (P's Resistance to Ds' Motion for Partial Summary Judgment on Counts VI Through IX and supporting brief, App. 128-147).

B. DISPOSITION OF THE CASE IN THE DISTRICT COURT

On April 8, 2015, the Iowa District Court for Polk County, the Honorable Brad McCall presiding, granted Defendants' Motion for Partial Summary Judgment on Counts VI Through IX. (4/8/15, District Court Order, App. 160). Thereafter, Plaintiff filed a timely Application for Interlocutory Review (P's Application for Interlocutory Review, App. 168), which was granted by this Court on May 28, 2015 (5/28/15 Supreme Court Order, App. 170).

VII. STATEMENT OF FACTS

Plaintiff Christopher J. Godfrey began work in January 2006 as the Interim Workers' Compensation Commissioner for the state of Iowa after

his appointment by Governor Tom Vilsack. (Third Amended Petition, ¶ 17, App. 4). His appointment was confirmed by the Iowa Senate on April 11, 2007. (*Id.*, at ¶ 18, App. 4). After his initial appointment for a partial term expired in 2009, Governor Chet Culver appointed Plaintiff to serve a six-year term, which the Iowa Senate confirmed on March 30, 2009. (*Id*., at ¶¶ 19, 20, App. 4). Plaintiff's term was not due to expire until April 30, 2015. (*Id*., at ¶ 21, App. 4).

Plaintiff's position as Workers' Compensation Commissioner is statutorily mandated by Iowa Code § 86.1 (2011). (Third Amended Petition, ¶ 22, App. 4). His duties are statutorily defined. (*Id.*, at ¶ 23, App. 4). Iowa Code § 86.1 establishes a six-year term of office for the Workers' Compensation Commissioner. (*Id.*, at ¶ 24, App. 4). Throughout his employment, Plaintiff's salary was gradually increased until it represented the maximum possible salary for his position. (*Id*., at ¶¶ 28-35, App. 5). While employed by the State of Iowa, Plaintiff had never been the subject of a disciplinary action. (*Id.*, at ¶ 36, App. 5).

However, in a letter dated December 3, 2010, Defendant Terry Branstad demanded Plaintiff's resignation. (Third Amended Petition, at ¶ 37, App. 5). Plaintiff refused to resign, because the six-year term to which he

was appointed indicated that the Iowa Legislature intended for his position to be non-partisan and insofar as possible insulated from politics. (*Id*., at ¶ 38, App. 5). At a meeting with Defendants Branstad, Reynolds and Boeyink on December 29, 2010, Defendants again demanded Plaintiff's resignation. (*Id*., at ¶¶ 39, 40, App. 6). At this meeting, Plaintiff informed Defendants of the many positive improvements he had instituted at the Workers' Compensation Division and agreed to be supportive of the goals espoused by Defendant Branstad insofar as doing so would conform to his duties and responsibilities. (*Id*., at ¶ 41, App. 6).

Defendants Branstad and Reynolds were inaugurated on January 14, 2011. (Third Amended Petition, at ¶ 42, App. 6). Plaintiff continued his work as Workers' Compensation Commissioner and received no complaints regarding his performance. (*Id*., at ¶ 43, App. 6). He was not contacted by Defendant Brandstad or any member of his administration. However, in July 2011, Plaintiff was again summoned to a meeting with Defendants Findley and Boeyink, political appointees of Defendant Branstad, where Defendants once again demanded his resignation. (*Id*., at ¶¶ 44, 45, App. 6). Plaintiff again asserted that his position was non-partisan and quasi-judicial in nature. (*Id*., at ¶ 46, App. 6). He refused to resign. (*Id*., at ¶ 46, App. 6).

Thereafter, Defendants Findley and Boeyink tried to intimidate and harass Plaintiff into resigning by telling him that his pay would be immediately decreased from the top of the pay grade to the bottom of his pay grade if he refused to resign. (Third Amended Petition, at ¶ 47, 48. App. 6-7). Plaintiff again refused to resign on the basis that his position was neither political nor partisan. (*Id*., at ¶ 47, App. 6). Defendants did not criticize, or even discuss, Plaintiff's work performance either at the July 2011 meeting or the earlier meeting in December 2010. (*Id*., at ¶ 49, App. 7).

On July 11, 2011, upon returning to his office, Plaintiff confirmed with human resources that his salary had in fact been reduced to $73,250. (Third Amended Petition, at ¶ 50, App. 7). The Governor lowered Plaintiff's salary from $112,068.84, the highest level allowed, to $73,250, the lowest amount he could be paid. When the Governor and his staff were questioned about their actions, they accused Plaintiff of poor performance. However, Plaintiff's duties and responsibilities had not been reduced in any way and he continued to perform his duties in an exemplary manner even after his salary was reduced. (*Id.*, at ¶¶ 51, 52, App. 7).

Plaintiff brought a lawsuit against the State and six individuals. (Third Amended Petition, App. 1). The suit included causes of action for

violating Plaintiff's equal protection and due process rights as secured by the Iowa Constitution. (*Id*., at ¶¶ 89-119, App. 15-20). It is from the District Court's ruling (4/8/15 District Court Order, App. 160) dismissing the constitutional causes of action found in Counts VI through IX that Plaintiff appeals.

VIII. ARGUMENT

A. THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE IOWA CONSTITUTION ARE SELF-EXECUTING

1. Preservation of Error

On April 23, 2015, Plaintiff filed a timely application for interlocutory review in accordance with Iowa Rule of Appellate Procedure 6.104. (4/23/15 Application for Review, App. 168). On May 28, 2015, this Court granted Plaintiff's application. (5/28/15 Supreme Court Order, App. 170).

2. Scope of Review

Appellate courts review constitutional claims de novo. *State v. Harris*, 741 N.W.2d 1, 4 (Iowa 2007).

3. Argument

a. The Language of the Iowa Constitution Supports the Self-Executing Nature of its Equal Protection and Due Process Clauses

A constitutional provision may be said to be "self-executing" if it:

> "supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced….Where a constitutional provision is complete in itself it needs no further legislation to put it in force…[W]here a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provision. In short, if complete in itself, it executes itself."

Davis v. Burke, 179 U.S. 399, 403 (1900). So proclaimed the United States Supreme Court over one hundred years ago, in clear acknowledgement that constitutional provisions may, in fact, be self-executing and do not necessarily depend on further legislative action to become operative. *Id.* Such is the case with respect to the due process[1] and equal protection[2] provisions of the Iowa Constitution that are at issue before the Court today.

[1] "The right to trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const., art. I, § 9.

Defendants, predictably, have argued strenuously that a direct cause of action under these provisions simply does not exist. However, it is illogical to suppose that the Iowa Constitution, the supreme law of Iowa which grants fundamental rights to all citizens of the State, fails to provide any means for injured individuals to assert their constitutional rights in a court of law. Support for the exercise of such rights exists on several levels and is in keeping with decisions in dozens of other jurisdictions which have recognized the importance of the courts' ability to award appropriate damages, including money damages, when citizens' constitutional rights are trampled by governmental actors.

Article XII, Section I of the Iowa Constitution does indeed call for the Legislature to "pass all laws necessary to carry [the] constitution into effect." Iowa Const. art. XII, §1. However, that same section begins with: "This ***constitution*** shall be the supreme law of the state[.]" *Id*. (emphasis added). These sections clearly do not require the passage of any laws in order to protect the rights of the people. In fact, the legislature need not enact ANY laws to effectuate the due process and equal protection provisions in the Iowa

[2] "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const., art. I, § 6.

Constitution. No legislative action is necessary to effectuate these foundational provisions. They are self-executing through the inherent power of the Iowa judiciary, which plays an equal role in protecting the constitutional rights of this state's citizens.

There is good reason to distinguish the analysis of statutes with respect to whether a cause of action exists from the analysis of whether the violation of a constitutional provision gives rise to an independent cause of action. The Iowa Constitution simply cannot be rendered ineffectual by the failure to enact an ordinary statute. *See*, i.e. *Varnum v. Brien*, 763 N.W.2d 862, 876 (Iowa 2009) ("[T]he constitution is the supreme law and cannot be altered by the enactment of an ordinary statute."). The protections afforded by the Iowa Constitution and the statutory laws enacted by the legislature are two different sources of individual rights. State constitutional rights are not statutorily granted and do not depend upon statutory enactment to exist or to be enforced. In *Varnum*, the Court observed:

> "The Iowa Constitution is the cornerstone of governing in Iowa…Among other basic principles essential to our form of government, the constitution defines certain individual rights upon which the government may not infringe…All these rights and principles are declared and undeniably accepted as the supreme law of this state, against which no contrary law can stand. See,

> Iowa Const. art. XII, § 1 ('This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void.')."

Id., at 875 (other citations omitted). It further proclaimed:

> "It is also well established that courts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms. As was observed by Justice Robert H. Jackson decades ago in reference to the United States Constitution, the very purpose of limiting the power of the elected branches of government by constitutional provisions like the Equal Protection Clause is 'to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'"

Id., citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). It is clear that the basic tenets from which our state constitutional rights spring demand that Iowa courts be free to enforce such rights upon their own power and authority when violations against state citizens occur.

Drawing upon these principles and in acknowledgement of the judicial right to provide remedies for constitutional violations upon its own volition, Iowa should join the majority of states that have found their state constitutional rights to be self-executing. The basis for doing so is found in

the genesis of constitutional jurisprudence. "The very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Iowa courts must be ready to retain the ability to right constitutional wrongs pursuant to an independent cause of action that is rooted in the Iowa Constitution itself, without the necessity for additional legislative action. The self-executory nature of Iowa's equal protection and due process clauses is evident and this Court now has the opportunity to firmly and definitively establish this founding constitutional principle.

b. The *Bivens* and *McCabe* Decisions Support Recognizing a Private Cause of Action Pursuant to the Iowa Constitution

In the seminal case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1999), the U.S. Supreme Court recognized a right under the federal common law to recover damages against governmental officials who violate certain federal constitutional rights. That Congress had not specifically provided for such a remedy, i.e. no "enabling" legislation was in effect, was of no consequence. *Id*.

> "That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary

> remedy for an invasion of personal interests in liberty. See, *Nixon v. Condon*, 286 U.S. 73 (1932); *Swafford v. Templeton*, 185 U.S. 487 (1902); *Wiley v. Sinkler*, 179 U.S. 58 (1900)…(further citations omitted)…
>
> Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation… [but]…[t]he present case involves no special factors counseling hesitation in the absence of affirmative action by Congress."

Id., at 396. The Court further observed that Congress had not provided another equally effective remedy, nor had it prohibited an award of damages. *Id*., at 397. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id*., at 391-92, citing *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Bemis Brothers Bag Co. v. United States*, 289 U.S. 28, 36 (1933) (Cardozo, J.); *The Western Maid v. Thompson*, 257 U.S. 419, 433 (1922) (Holmes, J.).

The *Bivens* decision provided the foundational analytical framework for considering violations of state constitutional provisions and has been relied upon by innumerable courts in addressing this issue. For example, in *McCabe v. Macaulay*, 551 F. Supp. 2d 771 (N.D. Iowa 2007) (aff'd in part and rev'd in part on other grounds by *McCabe v. Parker*, 608 F.3d 1068 (8th

Cir. 2010)),the federal court for the Northern District of Iowa found that the state's highest court would, in fact, recognize an Iowa analogue to *Bivens*. In doing so, it relied upon United States Supreme Court decisions and those of other state courts of last resort. *Id.*, at 785. The *McCabe* court predicted that, based upon the federal *Bivens* decision recognizing an implied constitutional cause of action pursuant to the federal constitution, and the fact that nineteen states with analogous constitutional provisions have recognized these actions pursuant to their own state constitutions, the Iowa Supreme Court would decide with "the great majority" of state courts in recognizing the ability to bring these causes of action under the Iowa Constitution. *Id.* (quoting *Binette v. Sabo*, 710 A.2d 688, 693–96 (Conn. 1998)); *see also*, Restatement (Second) of Torts § 874A (1979).

In *McCabe*, protesters brought an action against the Iowa State Patrol and two state troopers alleging that their constitutional rights were denied when they were arrested for criminal trespass at a political rally held in a public park. The plaintiffs maintained that they should be permitted to bring their state constitutional claims directly against the troopers under the common law. *Id.*, at 784, citing *Bivens*, 403 U.S. 388 (1971).

The *McCabe* defendants argued that the plaintiffs' state constitutional claims should be dismissed because no direct cause of action existed for the alleged constitutional violations. *Id*., at 782. In support, they cited the finding in *Cunha v. City of Algona*, 334 N.W.2d 591 (Iowa 1983), in which a former prisoner sued an Iowa county for due process violations pursuant to the Iowa Constitution after a federal district court granted him habeas corpus relief. The Iowa Supreme Court in that case held that the plaintiff had failed to state a claim upon which relief could be granted, quoting extensively from a treatise that concluded that "local government damages liability for Fourteenth Amendment violations cannot be based solely on the Fourteenth Amendment using respondeat superior or any other theory of liability". *Cunha*, 334 N.W.2d 591, 595 (Iowa 1983) (citation omitted). The *McCabe* Court, however, was not persuaded by this argument. It found *Cunha* distinguishable and stated that:

> "At most, *Cunha* rejects a direct cause of action under the due process clause of the Iowa Constitution for monetary damages against a local governmental entity for reasons expressed in *Monell*.[3] It does not address whether there is

[3] In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the United States Supreme Court extended § 1983 liability to local governments, prompting the *Cunha* court to conclude that "[t]he current trend of opinion…appear[s] to be against the existence of direct municipal liability for constitutional violations". *Cunha*, 334 N.W.2d 591, 595 (Iowa 1983).

> an Iowa analogue to *Bivens* under the common law when, as here, Iowa government officials are alleged to have violated the Iowa Constitution and the Iowa General Assembly has not specifically provided a statutory remedy for such violations."

Id., at 785.

Without a case directly on point from Iowa's high court, the *McCabe* court was tasked with predicting how the Iowa Supreme Court would resolve the issue and in doing so, found ample evidence that the an Iowa analogue to *Bivens* would, in fact, be recognized. *Id.* In addition to citing the recognition in numerous other jurisdictions that *Bivens*-type causes of action could be brought under state constitutions, it pointed out that this conclusion is also consistent with the Restatement (Second) of Torts, which recognizes the inherent authority of a state court of last resort to create a remedy for violations of the state constitution. *Id*., citing Restatement (Second) of Torts § 874A (1979) (recognizing remedy for violations of state constitutional provisions) (cited with approval in *Countryman v. Mt. Pleasant Bank & Trust Co.*, 357 N.W.2d 599, 605 (Iowa 1984)).

Accordingly, the *McCabe* Court refused to dismiss the plaintiff's constitutional claims brought directly pursuant to the Iowa Constitution. Although not binding on this Court, the *McCabe* conclusion is certainly

persuasive and offers a solid foundation for recognizing the validity of private state constitutional claims, as other cases have held.

For example, in *Peters v. Woodbury County, Iowa*, 979 F. Supp. 2d 901 (N.D. Iowa 2013), the Court stated that it agreed with the *McCabe* analysis and concluded that the defendants were not entitled to summary judgment on any claim for a violation of the Iowa Constitution simply because such a claim was alleged to be invalid. *Id*., at 971. Judge Mark W. Bennett also agreed with the *McCabe* finding and refused to grant summary judgment to a county defendant on a civil claim based upon the Iowa Constitution.[4] See also, *Hood v. Upah*, 2012 WL 2906300 (N.D. Iowa) ("Iowa courts have not yet held that a private cause of action may arise from a violation of the Iowa Constitution. However, as this court recognized in *McCabe v. Macaulay*, 551 F. Supp. 2d 771, 784-85 (N.D. Iowa 2007), the Iowa Supreme Court would likely recognize such an action). A solid

[4] "…Chief Judge Linda R. Reade has concluded that the Iowa Supreme Court would likely recognize such an action, as an analogue to an action against federal actors for violations of the United States Constitution in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); *McCabe v. Macaulay*, 551 F. Supp. 2d 771, 784-85 (N.D. Iowa 2007). I agree with Chief Judge Reade's analysis and conclude that the City Defendants are not entitled to summary judgment on the claim in Count I to the extent that it is based on a violation of the Iowa Constitution, because I conclude that such a claim is valid." *Clay v. Woodbury County, Iowa*, 982 F. Supp. 2d 904 (N.D. Iowa 2013).

foundation has been laid for the Iowa Supreme Court to establish this recognition today.

c. Many Other States Have Recognized That Provisions of Their Own Constitutions are Self-Executing

Following in the wake of *Bivens*, the courts in many states have recognized[5] that certain provisions of their own state constitutions are, in

[5] Of the state courts that have addressed the issue, the following recognized a cause of action under their state's constitution or indicated they would under certain circumstances and/or have addressed the self-executing nature of certain state constitutional clauses include: Alaska (*Dick Fischer Development No. 2, Inc. v. Dept. of Admin.*, 838 P.2d 263 (Alaska 1992), Arkansas (Ark. Code § 16-123-105 (1993)), California (*Venegas v. County of Los Angeles*, 87 P.3d 1 (Cal. 2004), *Katzberg v. Regents of University of CA*, 58 P.3d 339 (Cal. 2002), Cal. Civ. Code § 52.1(b)(2015)); Connecticut (*Binette v. Sabo*, 710 A.2d 688 (Conn. 1998), Illinois (*Newell v. City of Elgin*, 340 N.E.2d 344 (Ill. Ct. App. 1976), Louisiana (*Moresi v. State Through Dept. of Wildlife and Fisheries*, 567 So. 2d 1081 (La. 1990), Maine (*Andrews v. Dept. of Environmental Protection*, 716 A.2d 212 (Me.1998), Me. Rev. Stat. 5 § 4682 (1996)), Maryland (*Widgeon v. Eastern Shore Hospital Center*, 479 A.2d 921 (Md. 1984), Massachusetts (*Phillips v. Youth Development Program, Inc.*, 459 N.E.2d 453 (Mass. 1983), Mass. Gen. Laws 12 § 11I (1979), Michigan (*Smith v. Dept. of Public Health*, 410 N.W.2d 749 (Mich. 1987), Minnesota (*In re Wretlind*, 32 N.W.2d 161 (Minn. 1948), Montana (*Dorwart v. Caraway*, 58 P.3d 128 (Mont. 2002), Nebraska (*Goolsby v. Anderson*, 549 N.W.2d 153 (Neb. 1996); Neb. Rev. Stat. § 20-148(a)(1996)), New Hampshire (*Rockhouse Mountain Property Owners Assn., Inc. v. Conway*, 503 A.2d 1385 (N.H. 1986), New Jersey (*Strauss v. State of New Jersey*, 330 A.2d 646 (N.J. 1974), New Mexico (*State of New Mexico v. Perrault*, 283 P. 902 (N.M. 1929), New York (*Brown v. State of New York*, 674 N.E.2d 1129 (N.Y. 1996), North Carolina (*Corum v. University of NC Through Board of Governors*, 413 S.E.2d 276 (N.C. 1992), Ohio (*Provens v. Board of Mental Retardation & Developmental Disabilities*, 594 N.E.2d 959 (Ohio 1992), Oklahoma (*Bosh v. Cherokee County Building Authority*, 305 P.3d 994 (Okla. 2013), Utah (*Spackman ex rel. Spackman v. Board of Education*, 16 P.3d 533 (Utah 2000), Vermont (*Shields v. Gerhart*, 658 A.2d 924 (Vt. 1995), West Virginia (*Thorne v. City of Clarksburg*, 106 S.E. 644 (W.Va. 1921), and Wisconsin (*Old Tuckaway Assoc. Ltd. Partnership v. Greenfield*, 509 N.W.2d 323 (Wis. App. 1993). See, also *Dorwart v. Caraway*, 58 P.3d 128, 133 (Mont. 2002) (citing Gail Donoghue & Jonathan I. Edelstein, *Life After Brown: The Future of*

fact, self-executing. Such findings have occurred even in the presence of enabling clauses similar to the one found in the Article 12, § 1 of the Iowa Constitution,[6] which has been wrongly interpreted by detractors to imply that the Iowa Constitution is not self-executing.

It is highly unlikely that the drafters of the Iowa Constitution meant for it to exist only as a toothless outline, necessitating legislative action before the rights it guarantees are protected. Other courts which have considered the question find such a proposition wholly untenable. For example, the high court of Vermont has opined that "[a]s the expression of the will of the people, a constitution stands above legislative or judge-made law . . . . Therefore, the absence of legislative enabling statutes cannot be construed to nullify rights provided by the constitution." *Shields*, 658 A.2d 924, 927 (Vt. 1995). Nor should the lack of a specific remedy itself defeat the contention that a constitutional provision is self-executing. *Id*., at 929.

State Constitutional Tort Actions in New York, 42 N.Y.L. SCH. L. REV. 447, 447 n.2 (1998).

[6] Of the states cited in Footnote 5, Maryland, Nebraska, New Jersey and New Mexico have identical or very similar provisions to that of Article XII, Sec. 1 of the Iowa Constitution. In these states, the courts have allowed a cause of action directly under their constitution despite not having a direct corollary to 42 U.S.C. § 1983 or 42 U.S.C. § 1988.

Similarly, a lack of enabling statutes for certain provisions of the Iowa Constitution does not nullify the rights protected therein. Care must be taken by the judiciary, however, that such rights are not essentially nullified by denying a remedy for violations of those rights. The Iowa Supreme Court, in its "responsibility to independently construe the Iowa Constitution," *State v. Short*, 851 N.W.2d 474, 481 (Iowa 2014), should recognize a cause of action which would allow Iowans a remedy for violations of their constitutional rights as enumerated by the Iowa Constitution in order to ensure that such nullification does not prevent redress for state constitutional wrongs.

In *Shields*, the Vermont Supreme Court was asked to consider whether Chapter I, Article 13 of its state constitution concerning the protection of free speech was self-executing.[7] At the outset it stated, "Our limited experience with Article 13 does not inhibit us from finding it to be self-executing." *Id*., at 930. It found that Article 13 "unequivocally expresses more than a general principles alone", but instead "sets forth a

[7] "That the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained." Vt. Const., ch. I, art. 13.

single, specific right of the people to make themselves heard, a fundamental characteristic of democratic government." *Id*. It went on to find:

> "Since Article 13 establishes a specific free speech right, the absence of a legislative directive supports a conclusion that the provision is self-executing. Indeed, it would make little sense to have the right to speak out on government matters depend on legislative enactment, considering the fundamental nature of citizen input in our republican form of government. Finally, recognizing a self-executing right to free speech and to seek redress for its infringement comports with the general constitutional scheme."

Id. The Court opined that Article 13 created a specific right "crucial to the operation of government and vital to the effectuation of other enumerated rights" and concluded that the provision was self-executing and could serve as the basis for a private cause of action against the state. *Id*. See also, i.e. *In re Request for Advisory Opinion from House of Representatives*, 961 A.2d 930 (R.I. 2008) (finding separation of powers amendments to state constitution are self-executing).

The due process and equal protection clauses of the Iowa Constitution at issue in this case are no less fundamental rights than the free speech provision at issue in *Shields*. They are not simply general principles, but set forth specific and singular rights of the people. They contain no directive that further legislative action is necessary or desirable to effectuate their

enforcement. Nor are they any less indispensable to our tenets of democracy. They are absolutely essential to the preservation and protection of innumerable constitutional, statutory and common law rights. An acknowledgement of the clauses' self-execution is essential to safeguarding and maintaining foundational rights of all Iowa citizens.

In *In re Town Highway No. 20*, 45 A.3d 54, 66 (Vt. 2012), the Vermont high court again considered whether a state constitutional provision was self-executing. It found that Chapter I, Article 7[8], which prohibits the government from favoring any one person or family over another, expresses a fundamental right as clear as the right of free speech set out in Article 13 and, therefore, was self-executing even though, like Article 13, it provided no private remedy for discriminatory treatment. *Id*., at 67.

> "As was the case with Article13, it would make little sense for Article 7 to require legislative action in order to prohibit biased and exclusionary government actions… Given that the aim of [Article 7] is to protect the state from favoritism to individuals and to remind citizens of the sense of compact that lies at the heart of

[8] "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community judged most conducive to the public weal." Vt. Const. ch., I, art. 7.

> constitutional government, recognizing a cause of action to ensure this same goal does no violence to our constitutional scheme. Quite the contrary, affording citizens the right to challenge perceived partiality by a governmental entity ensures vigorous protection for the community compact that is the heart of government. A private right of action under Article 7 does no injury to the framework of protections laid out in our Constitution. Accordingly, we conclude that Article 7 is self-executing."

Id. (quotation omitted).

Most recently, the Supreme Court of Vermont held that Chapter I, Article 4[9] of the Vermont Constitution – its due process clause – is self-executing. *Nelson v. Town of Johnsbury Selectboard*, 2015 WL 1186178 (Vt.). While the Court recognized that the clause addressed a very broad concept stated in language from an earlier century, it stressed that it did not believe that the drafters of Article 4 would have intended that judicial access be denied by legislative inaction in creating an enforceable mechanism. *Id*., at *13.

> "The principles of due process have been developed and applied in thousands of decisions from the state and federal courts. To say that the language from which

[9] "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obligated to purchase it; completely and without any denial; promptly and without delay; conformably to the laws." Vt. Const., ch. I, art. 4.

> these principles are drawn is too vague and general to enforce ignores the immense body of law. While that law did not exist when the constitutional provisions were written, we believe that this growth and development was intended by the drafters. In this way, we find Article 4 no more broad or general than Article 7, which we held as self-executing in Town Highway No. 20."

Id.

In support of its reasoning, the *Nelson* Court noted other state courts have found that the due process provisions of their state constitutions are enforceable by appropriate court action even without implementing legislation. *Id*., see e.g., *Katzberg v. Regents of University of California*, 58 P.3d 339, 342-43 (Cal. 2002) (holding that due process clause is self-executing because :[i]t is clear that…even without any effectuating legislation, all branches of government are required to comply with its terms"); *In re Wretlind*, 32 N.W.2d 161, 167 (Minn. 1948) (stating that "prohibitive clauses of the constitution such as the due process clause are self-executing and require no legislation for their enforcement"); *Dorwart v. Caraway*, 58 P.3d 128 (Mt. 2002) (recognizing valid cause of action under due process clause of state constitution); *Spackman ex rel. Spackman v. Board of Education*, 16 P.3d 533 (Ut. 2000) (due process clause of state constitution providing that "[n]o person shall be deprived of life, liberty or

property, without due process of law" is self-executing because its terminology is mandatory and prohibitory; "Although the right to due process is expressed in relatively general terms, it is both judicially definable and enforceable."); *Widgeon v. Eastern Shore Hospital Center*, 479 A.2d 921, 923 n.5, 930 (Md. 1984) (state constitutional provision stating "[t]hat no man ought to be…deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land" gives rise to a private right of action).

In *Binnett v. Sabo*, 710 A.2d 688, 693-96 (Conn. 1998), the Connecticut Supreme Court held in its answer to a certified question from the district court, that violations of the state constitution's right to be free from unreasonable searches and seizures and illegal arrests could give rise to a private cause of action for money damages. In doing so, it observed:

> "It would be incongruous to hold that our constitution is a dryer source of private rights than the federal constitution or our own statutes…If the legislature has not provided a remedy or if the remedy is not reasonably adequate… in view of the facts of a particular case, a private cause of action is constitutionally available to right the wrong. In the absence of any persuasive argument or authority to the contrary, we conclude that we possess the inherent authority to create a cause of action directly under the Connecticut constitution."

Id., at 693-94 (quotations omitted) (relying upon the *Bivens* reasoning, historical Connecticut common law, the Restatement (Second) of Torts § 874A and its own inherent power to recognize new causes of action in recognizing a private cause of action under the state constitution). *In accord*, *Outlaw v. City of Hartford*, 2015 WL 1538230, *13 (D. Conn) (district court recognized plaintiff's valid private cause of action pursuant to Article I, §§ 7 and 9 of state constitution which prohibit unreasonable searches and seizures and illegal arrests).

In *Dorwart*, a judgment debtor sued county officials following a seizure of property from his home, alleging procedural due process and search and seizure violations under federal and state constitutions, violation of the state constitutional right to privacy and § 1983 claims. *Dorwart*, 58 P.3d 128 (Mont. 2002). One of the specific issues on appeal was whether a violation of the rights guaranteed by the Montana Constitution gave rise to a cause of action for damages. *Id*., at 129.

After noting that the majority of legal scholarship on the topic of state constitutional tort actions has "favored an expansive right of action" and a thorough discussion of *Bivens* and the Restatement (Second) of Torts § 874A, the Supreme Court of Montana held that the plaintiff had a cause of

action for money damages for the violation of the provisions of the state constitution protecting the right to privacy, the right to be protected against unreasonable searches and seizures and the right to due process of law. *Id*., at 136 ("We conclude that the *Bivens* line of authority buttressed by § 874A of the Restatement (Second) of Torts are sound reasons for applying a cause of action for money damages for violations of those self-executing provisions of the Montana Constitution.")

In *Thorne v. City of Clarksburg*, 106 S.E. 644, 646 (W. Va. 1921), the Court observed that it is "a generally recognized rule that legislation is unnecessary to enable the courts to give effect to constitutional provisions guaranteeing the fundamental rights to life, liberty and the protection of property". In finding that a state constitutional provision[10] regarding the taking or damaging of private property for public use was self-executing, it stated:

"The fact that the Legislature has omitted for so many years

[10] "Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law: Provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders." W. Va. Const., art. III, § 9.

> to make special provision for ascertaining compensation to the owner for property damaged but not taken by condemnation argues strongly that no legislation was regarded necessary to protect one in his constitutional right to a jury of freeholders; otherwise the legislative branch of the government would be convicted of a purpose to withhold this constitutional right…[I]f this provision of the Constitution can be given reasonable effect without legislation, it ought to be regarded as self-executing."

Id., at 647.

The fact that many courts have specifically recognized a private cause of action for damages under their states' constitutions and/or the self-executing nature of certain state constitutional clauses, including multiple courts in states that have enabling clauses similar to the Iowa Constitution strongly suggests that Iowa should follow suit. The time has arrived for the Iowa Supreme Court to clearly define the parameters of this state's constitutional protections and to make clear that such protections include constitutionally-based causes of action for violations of due process and equal protection rights secured by the Iowa Constitution.

d. Support for the Self-Executing Nature of Constitutional Provisions Can Be Found in the Restatement (Second) of Torts and the English Common Law

The Restatement (Second) of Torts also supports Plaintiff's cause of action for damages under the Iowa Constitution. Section 874A provides that a court may provide a remedy when the legislature does not provide for one in a legislative provision.

> "When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action."

Id.

A "legislative provision" is defined in comment (a) as including constitutional provisions. *Id*. at cmt. a. The majority of state courts finding a right to sue directly under their respective state constitutions have used section 874A of the Restatement as one of the justifications for their decision. Rosalie Berger Levinson, *Recognizing a Damage Remedy to Enforce Indiana's Bill of Rights*, 40 Val. U. L. Rev. 1, 12-13 (2005).

Furthermore, English common law, from which the United States' legal system sprang, has recognized a cause of action for damages when rights secured by its fundamental charters and constitutions are violated since the Magna Carta was issued nearly eight-hundred years ago.[11] *Id*. at 13 (citations omitted). In *Widgeon v. Eastern Shore Hospital Center*, 479 A.2d 921, 923-24 (Md. 1984), the Maryland Supreme Court stated the following as part of their rationale for allowing a Plaintiff to sue directly under that state's Declaration of Rights:[12] "Under the common law of England, where individual rights…were preserved by a fundamental document (e.g. the Magna Carta), a violation of those rights generally could be remedied by a traditional action for damages." *Id.* (parenthesis in original).

For example, in *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489, the Court decided that English common law allowed for constitutionally-based damages for unlawful government actions. In this case, Wilkes' home was unlawfully entered and papers seized without a warrant by an agent of the Secretary of State. *Id.* In his jury instructions, the presiding judge, charged

[11] The Magna Carta was issued in 1215.

[12] Maryland's Declaration of Rights is similar to Iowa's Bill of Rights.

"the official had acted '*contrary to the fundamental principles of the constitution*,'" and ordered the jury to consider the constitutional violations in assessing damages. *Id*. (internal quotations and emphasis in original).

In another English case, a man was placed in custody by government officials with an illegal general warrant, the presiding Lord found that the Secretary of State violated the Magna Carta by granting the unlawful warrant. *Id*. (citing *Huckle v. Money*, (1763) 95 Eng. Rep. 768). Lord Pratt forcefully spoke of the following, which sounds much like the analysis in *Bivens*: "[the jury did not see a personal injury done to the plaintiff, instead] they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom." *Id*. (quoting *Huckle*, (1763) 95 Eng. Rep. 768). If "people" is substituted for "King's subjects" and is substituted for "kingdom" in that quotation, we have the precise situation Plaintiff is in now. His inalienable Constitutional rights were violated by officers and employees of the government and as a result, the court should give him a cause of action for damages to vindicate their usurpation.

Sound reasoning for finding that our due process and equal protection state constitutional clauses are self-executing abounds. Iowa must not find

itself behind the curve in acknowledging this vitally important judicial tenet, especially given the Iowa judiciary's history of leading the way in terms of establishing, maintaining and guarding its citizens' individual rights. This Court is obligated to act affirmatively in this instance. It has an inalienable responsibility to make certain that the constitutional rights of Iowa citizens are definitively protected in every circumstance in which they might be violated. Plainly stating that these clauses are self-executing is the most effective and authoritative method for ensuring that that such protection is unconditionally granted.

e. As Injunctive Relief Pursuant to the Iowa Constitution May be Granted Absent Any Kind of Enabling Legislation, Damages Relief May Similarly Be Granted

In *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), same-sex couples who had been denied marriage licenses by the Polk County Recorder brought an action challenging the statute limiting civil marriage to a union between a man and a woman. In upholding the district court's summary judgment order in favor of the couples, the Iowa Supreme Court concluded that to deny the plaintiffs a right to marry was a violation of their equal protection rights pursuant to the Iowa Constitution. *Id*., at 906.

The remedy requested was injunctive in nature, i.e. admission into the institution of civil marriage. See, *Id*., at 906. After finding in favor of the plaintiffs, the Court ordered that the language in Iowa Code § 592.2 limiting civil marriage to a man and a woman be stricken from the statute and that the remaining statutory language "be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage". *Id*., at 907. The need for any further legislative action in order to carry out the Court's order was simply not an issue. The Court, relying on the power of the judiciary to ensure equal protection of the law and acknowledging its constitutional duty, declared the statute unconstitutional and ordered the necessary corrective action. *Id*., at 906.

The Court's right to grant injunctions on equal protection grounds, such as in *Varnum*, or in other instances where unconstitutional violations occur, without any kind of enabling legislation is clear. No one doubts that such a right exists in nearly every arena of jurisprudence and that parties who have been constitutionally wronged may receive a judicial remedy. See, i.e. *Hensler v. City of Davenport*, 790 N.W.2d 569, 590 (Iowa 2010) (parent brought action for declaratory and injunctive relief after being charged with violation of parental responsibility ordinance; court found ordinance violated

due process clause and severed offending portion); *State v. Dudley*, 766 N.W.2d 606 (Iowa 2009) (statute imposing repayment obligation on acquitted defendant without determining ability to pay violated equal protection clause; issued specific instructions regarding the calculation of defendant's debt); *In re Marriage of Howard*, 661 N.W.2d 183, 185 (Iowa 2003)(grandparent visitation statute overruled as unconstitutional on its face as it violated due process rights and liberty interests); *State v. Quinn*, 691 N.W.2d 403, 412 (Iowa 2005) (striking down statute criminalizing enticement of a minor found unconstitutionally overbroad on its face); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 185 (Iowa 2004) (statutory grant of nuisance immunity to animal feeding operations held unconstitutional); *Federal Land Bank of Omaha v. Lockard*, 446 N.W.2d 808 (Iowa 1989) (mortgage foreclosure moratorium statute found unconstitutional, thus mortgagee would be given two years to collect its deficiency judgment). Such is the Court's authority in the present case to declare a remedy for state constitutional violations without the necessity of legislative approval or authorization.

Justice Harlan's concurrence in the *Bivens* decision explains the parallel reasoning thus:

> "If explicit congressional authorization is an absolute prerequisite to the power of a federal court to accord compensatory relief regardless of the necessity or appropriateness of damages as a remedy simply because of the status of a legal interest as constitutionally protected, then it seems to me that explicit congressional authorization is similarly prerequisite to the exercise of equitable remedial discretion in favor of constitutionally protected interests. Conversely, if a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal Court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein…then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law."

Bivens, 403 U.S. 388, 405 (1979) (Harlan, J. concurring). There is simply no reason why the Court's power to grant compensatory damages for constitutional violations should be any more dictated by legislative action or inaction than its power to award equitable relief.

B. DIFFERENT REMEDIES ARE NEEDED FOR CONSTITUTIONAL AND COMMON LAW TORTS AND THERE IS NO OVERLAPPING COMMON LAW TORT REMEDY WHICH IS APPLICABLE TO PLAINTIFF'S INJURIES

1. Preservation of Error

On April 23, 2015, Plaintiff filed a timely application for interlocutory review in accordance with Iowa Rule of Appellate Procedure 6.104.

(4/23/15 Application for Review). On May 28, 2015, this Court granted Plaintiff's application. (5/28/15 Supreme Court Order, App. 170).

2. Scope of Review

Appellate courts review constitutional claims de novo. *State v. Harris*, 741 N.W.2d 1, 4 (Iowa 2007).

3. Argument

A citizen's rights to due process and equal protection under the Iowa Constitution cannot be delegated to the common law for enforcement. Common law torts and constitutional torts may share fundamental characteristics, but they are not identical. *See*, James J. Park, *The Constitutional Tort Action As Individual Remedy*, 38 Harv. C.R.-C.L. L. Rev. 393, 398 (2003) (contrasting state common law actions with federal constitutional tort actions—an analysis which can easily be applied to state constitutional tort actions). Common law torts are proven by showing the classic elements of duty, breach, causation, and damages. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 1, at 2 (5th ed. 1984). In such actions, the duty stems directly from the common law. *Id.*

Constitutional torts, on the other hand, track a similar duty and process—but the duty in this instance stems directly from the constitution

itself. *See* James J. Park, *The Constitutional Tort Action As Individual Remedy*, 38 Harv. C.R.-C.L. L. Rev. 393, 398 (2003). This constitutional duty "runs between a government official or municipality and the private individual," in contrast to the duty in a common law tort action, which typically runs between two private individuals (though a government agent or municipality may be implicated in certain situations). *Id.* This is a fundamental difference that simply cannot be disregarded.

The United States Supreme Court itself has drawn a sharp distinction between common law torts and constitutional torts. In *Bivens*, 403 U.S. 388, 391-92 (1971), the Court categorically dismissed the view that a government agent, acting under their governmental authority, trampling the constitutional rights of an individual is equivalent to a dispute between two private individuals. *Id.* Justice Brennan, writing for the majority, asserted the following: "An agent acting-albeit unconstitutionally-in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Id*. at 392 (citations omitted). "Power, once granted, does not disappear like a magic gift once it is wrongfully used." *Id*. (citations omitted).

Moreover, the interests protected by tort law "may be inconsistent or even hostile" to the interests of the people-the ultimate holders of sovereignty-that are guarded by the Constitution. *Id*. at 394. In recognition of the distinctive harm likely to result from the unlawful conduct of government actors, and not withstanding the availability of a state common-law remedy, the *Bivens* Court expressly rejected the defendants' contention that the plaintiff could obtain money damages to redress an unconstitutional invasion of his rights only by an action in tort under state law. *Id*., at 390.

For example, a private citizen demanding to enter another's house normally would not face liability for his actions if the homeowner allows his entry. *Id*. (citations omitted). However, a person unlawfully demanding to enter another's house wearing the cloak of governmental authority imposes a vastly different scenario. *Id*. (citations omitted). In this scenario, a private citizen's only protection against the governmental intrusion will likely be futile and may even be a crime. *Id*. at 394-95 (citations omitted). The only protection for a citizen facing an unauthorized governmental intrusion on their liberties is through a court of law. *Id*.

Accordingly, in *Brown v. State of New York*, 674 N.E.2d 1129 (N.Y. 1996), the New York's Supreme Court also recognized a cause of action for

damages under the state's constitution. The case involved an African-American male allegedly attacking an elderly white woman at knifepoint near a public university in Oneonta, New York. *Id*. at 1131. After being unable to find a suspect the morning after the attack, the New York State Police and University security agents ordered the university to provide them with a list with the names and addresses of all of the African-American male students. *Id*. at 1131-32. The officers then interrogated each African-American individual on the list. *Id*. at 1132. Their attempt to find a suspect proved unsuccessful. *Id*. Next, the law enforcement officials conducted a "five-day 'street sweep'", in which they systematically stopped and interrogated every nonwhite male they encountered in or around Oneonta. *Id*. Those efforts also proved unsuccessful and the officers never located a suspect. *Id*. The interrogatees filed a class action suit alleging their state and federal constitutional rights were violated by the officers' racially motivated actions. *Id*. at n.l.

In recognizing a cause of action for damages under the state constitution, the court appropriately described the policy differences between a common law tort and a constitutional tort. *Id*. at 1140-41. It stated that the concern of common law torts is "adjusting losses and

allocating risks." *Id*. at 1140. In contrast, the Constitution of New York and all other states' constitutions, along with the Federal Constitution, guard against "intrusions on personal liberty arising from the abuse of [government] power..." *Id*. Thus, the reason why our country's founders at both the federal and state levels drafted constitutions in the first instance was to protect against governmental intrusions on the people's personal liberty. Constitutions represent the people's protection of their sovereignty, the sovereignty that is ultimately theirs alone.

In *Dowart v. Caraway*, 58 P.3d 128 (Mont. 2002), the Montana Supreme Court summed up the inadequacy of common law tort remedies for state constitutional violations as follows:

> "The Defendant and Amicus Curia, Montana Defense Trial Lawyers Association, urge that already available common law tort remedies such as conversion and trespass are adequate remedies for the conduct alleged by the Plaintiffs and, therefore, a cause of action for violation of the Montana Constitution should not be authorized. However, we agree with the previous authorities that there is a great distinction between wrongs committed by one private individual against another and wrongs committed under authority of the state. Common law causes of action intended to regulate relationships among and between individuals are not adequate to redress the type of damage caused by the invasion of constitutional rights.

Id., at 137.

More recently, in *Peschel v. City of Missoula*, 664 F. Supp. 2d 1149 (D. Mont. 2009), an arrestee brought an action against city officials under § 1983, the state constitution and the common law alleging that his arrest was unlawful, that excessive force was used, and that he was deprived of necessary medical treatment after arrest. *Id*. The defendants argued that the plaintiff could not advance his state constitutional claims because he had other adequate remedies available to him. *Id*., at 1159. However, the federal district court, relying upon *Dorwart* found that even the availability of other remedies under the Montana statutory and common law did not preclude the plaintiff from advancing his claims under the Montana Constitution and refused to dismiss his claims. *Id*., at 1160.

Similarly, in *Washington v. Barry*, 55 P.3d 1036 (Okla. 2002), the Oklahoma Supreme Court held that a private cause of action may exist for inmates to recover for excessive force under the provisions of the state constitution notwithstanding the existence of a state tort claims act and any cause of action it might provide or any governmental immunity it might confer. See also, *Bosh v. Cherokee County Building Authority*, 305 P.3d 994

(Okla. 2013) (state constitution provides a private cause of action for excessive force despite immunities in state tort law).

In the present case, the alternative methods of relief Defendants identify, namely the Iowa Civil Rights Act, do not provide an adequate remedy for redress of the violation of Plaintiff's inalienable rights to equal protection and due process under the Iowa Constitution. The Iowa Civil Rights Act protects a vastly different interest than does the Constitution of the State of Iowa. The ICRA codifies enumerated protections against discrimination based on a person's age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, disability, and familial status. *See generally:* Iowa Code §§ 216.1–216.21 (2009).

Significantly, Plaintiff's claims are also founded, in part, on constitutional violations based on partisan politics. Because the ICRA does not address discrimination based on partisan politics, it neither offers him a remedy nor can it be used to preclude Plaintiff from seeking relief for such a violation. Plaintiff must have the opportunity to seek a meaningful and complete remedy. The correct method for seeking such a remedy is through a direct constitutional claim, and the appropriate forum is this court.

Critics of providing remedies for torts under both the common law and under state constitutions often cite redundancy in available remedies as a reason for refusing to recognize both causes of action. In this particular case, however, the violations of Plaintiff's constitutional rights to due process and equal protection of the laws under the Iowa Constitution cannot be remedied by way of a common law negligence action. While such common law actions may provide a remedy for the breach of Defendants' common law duties, they cannot remedy the breach of Defendants' duty under the Iowa Constitution to ensure Plaintiff's right to equal protection of the laws, as laid out by the framers of the Bill of Rights.

In *Bivens*, "the Court acknowledged that the common law could not adequately regulate the government's unique power to inflict injury upon individuals." *Bivens*, 403 U.S. 388 (1971). As such, the government's power to inflict injury must be balanced with the protection of individual rights under the Constitution—rights which must be protected through the right to sue government officials for violations of an individual's constitutional rights, and an opportunity to collect damages for such violations. The citizens of Iowa must be guaranteed this opportunity.

C. THE JUDICIARY IS THE APPROPRIATE BRANCH TO RECOGNIZE AN INDIVIDUAL CAUSE OF ACTION FOR DAMAGES UNDER THE IOWA CONSTITUTION WHEN A CITIZEN'S CONSTITUTIONAL RIGHTS PURSUANT TO THE IOWA CONSTITUTION ARE VIOLATED BY STATE ACTORS

1. Preservation of Error

On April 23, 2015, Plaintiff filed a timely application for interlocutory review in accordance with Iowa Rule of Appellate Procedure 6.104. (4/23/15 Application for Review). On May 28, 2015, this Court granted Plaintiff's application. (5/28/15 Supreme Court Order, App. 170).

2. Scope of Review

Appellate courts review constitutional claims de novo. *State v. Harris*, 741 N.W.2d 1, 4 (Iowa 2007).

3. Argument

The Defendants' belief that Article 12, Section 1 of the Iowa Constitution grants the legislature the sole power to enforce the rights enumerated in the Iowa Constitution is incorrect and at odds with the republicanism upon which the governments of the State of Iowa and our nation were built. It is well established that the Iowa Constitution reigns supreme over all of the branches of state government, including the

legislative branch. *C. C. Taft Co. v. Alber*, 185 Iowa 1069, 171 N.W. 719, 720 (1919); *see*, Iowa Const. art. XII, § 1 ("[The] constitution shall be the supreme law of the state."). The Constitution reigns supreme because the people of Iowa hold the state's sovereignty--not the legislative, executive, nor judicial branch. *Id*. The Constitution is, in essence, the people's voice. *Id.*; *see*, Iowa Const. art. I, § 2 ("All political power is inherent in the people."). The three branches of "government [are] a fictitious entity…created by the people…through which they act" and those entities are bound to act within the fundamental law stated in the Constitution. *Id.*; see also, *Varnum*, 763 N.W.2d 862, 875 (Iowa, 2009) ("It is also well established that courts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms . . . [T]he very purpose of . . . constitutional provisions like the Equal Protection Clause is 'to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" *Id.* (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943) (alteration in original)).

Citizens' inherent political power, however, cannot be exercised by each and every person individually. Instead, the people have, through the Iowa Constitution, vested their inherent legislative authority in the General Assembly.[13] *Stewart v. Polk County Board of Supervisors*, 30 Iowa 9, 1870 WL 190, at *4-5 (1870); Iowa Const. art. III, § 1. However, ''[t]he General Assembly [only] possesses all legislative authority not delegated to the general government or prohibited by the Constitution." *Morrison v. Springer*, 15 Iowa 304, 1863 WL 215, at *22 (1863). The general government is that of the people, and the people have not delegated their fundamental constitutional rights and liberties to the changing seasons of the legislature.[14] The people have inscribed them on tablets of constitutional stone, intending them to be the foundation of their existence as citizens of the State of Iowa.

Furthermore, the judiciary is unquestionably the guardian and final arbiter of the state Constitution. *Kruidenier v. McCulloch*, 258 Iowa 1121,

[13] The people have also delegated their inherent executive and judicial authority for the same reasons. See generally, IOWA CONST. art. III, §1.

[14] See Iowa Const. art. I, § 2 ("All political power is inherent in the people."), and Iowa Const. art. I, § 25 ("The enumeration of rights shall not be construed to impair or deny others, retained by the people.")

142 N.W.2d 355, 361 (1966) (citations omitted). The courts, as the interpreters of [the] law[], will stand as the arbiters of all litigated matters…between the individual and any department of the government which transgresses any of his inalienable rights."[15] *Pierce v. Green*, 229 Iowa 22, 294 N.W. 237, 248 (1940). The government officers and employees here have violated Plaintiff's inalienable Constitutional rights. Thus the court, as supreme arbiter of government transgressions upon those rights, should hold that he has a cause of action for damages.

Critics argue that the enabling clause must be interpreted to mean that unless a statute is enacted, directly implementing a constitutional cause of action, then remedies for such claims cannot exist under the Constitution. This is simply not the case. As previously noted, the Supreme Court of Iowa has the "responsibility to independently construe the Iowa Constitution." *Short*, 851 N.W.2d 474, 481 (2014). It is important to note that high courts in other states, including Maryland[16], New Jersey[17], and New Mexico[18] have

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[15] *E.g.* "All men and women have certain inalienable rights-among which are,…enjoying and defending life and liberty…and pursuing and obtaining safety and happiness." Iowa Const. art. I, §1.

[16] See, *Widgeon v. Easter Shore Hospital Center*, 479 A.2d 921 (Md. 1984).

[17] See, *Peper v. Princeton University Board of Trustees*, 389 A. 2d 465, 476 (N.J. 1978).

recognized an implied constitutional cause of action, in spite of having enabling clauses very similar to the one in Article 12, §1 of the Iowa Constitution, folded into their state constitutions. This Court has stated that "when individuals invoke the Iowa Constitution's guarantees . . . courts are bound to interpret those guarantees." *Varnum*, 763 N.W.2d 862, 876 (Iowa 2009).

The Court has a duty to address Plaintiff's claims under the Iowa Constitution. Justice Harlan penned the oft-quoted statement in *Bivens* that contemporary jurisprudence appears to "link 'rights' and 'remedies' in a 1:1 correlation." *Bivens*, 403 U.S. at 402 n. 3 (Harlan, 1, concurring) (citing *Marbury v. Madison*, 1 Cranch 137, 1803 WL 893 (1803) (internal quotations in original)). Plaintiff's inalienable Constitutional rights were infringed and he is left entirely without a remedy for the government's violation of those rights. The rule from the beginning is that when a protected right is violated, the court will grant a remedy to vindicate that right. *Id*. (quoting *Bell*, 327 U.S. 678, 684 (1946)).

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[18] See, N.M. Stat. § 41-4-4 (2015)

In *Short*, 851 N.W.2d 474, 484 (Iowa 2014), this Court cited *The Debates of the Constitutional Convention of the State of Iowa* as a means of impressing upon the reader the historical relevance and gravity of threats to individual liberties guaranteed by the Bill of Rights. *Id.*, quoting *The Debates of the Constitutional Convention of the State of Iowa*, 103 (w. Blair Lord rep., 1857), www.statelibraryofiowa. org/services/collections/law-library/iaconst. Justice Appel quotes the speaker as stating that "the Bill of Rights is of more importance than all the other clauses in the constitution put together, because it is the foundation and written security upon which the people rest their rights." *Id.* The equal protection and due process clauses of the Iowa Constitution are contained within its Bill of Rights, and such foundational rights must be protected with the fervor anticipated by the constitution's drafters.

Furthermore, this Court has stated that "[t]he personal liberties of the people of Iowa specifically guaranteed by the Constitution cannot be invaded, because there is no elasticity in the specific guaranty of the Constitution." *Des Moines Joint Stock Land Bank of Des Moines v. Nordholm*, 217, Iowa 1319, 253 N.W. 701, 725 (1934). Due process and equal protection rights are civil liberties, or "immunities that restrain[]

government," *Iron Workers Local No. 67 v. Hart*, 191 N.W.2d 758, 772 (Iowa 1971), allowing for greater respect for and enforcement of constitutional rights. In fact, "[c]ivil liberties are promoted because *both* the federal and state governments are expected to *independently* guarantee individual rights protections and thus safeguard against interstitial gaps." Helen Gugel, *Remaking the Mold: Pursuing Failure-to-Protect Claims Under State Constitutions Via Analogous Bivens Actions*, 110 Colum. L. Rev. 1294, 1328 (2010) (emphasis added).

Justice Appel's special concurrence in *State v. Baldon*, 829 N.W.2d 785 (Iowa 2013), provides a scholarly dissertation of the historical development of independent state constitutions and the foundation of legal rights that they provide. *Id*., at 804. ("From the get-go, these state constitutions were designed to be stand alone sources of law.") It also emphasizes the importance of state constitutional issues and the state judiciary's inclination to "jealously guard" its right to address such issues. *Id*., at 820.

Justice Appel describes at length the Iowa Supreme Court's obligation to construe the state constitution and to willingly address and resolve constitutional issues. *Id*., at 829. ("State supreme court justices have a

constitutional responsibility to do the very best job we can, in each and every case, and to decide state constitutional issues based on law, facts, and the best constitutional wisdom we can collectively muster.") He points out that "[a] number of state supreme courts have expressed frustration with lawyers who have failed to advance state constitutional arguments [and] in order to encourage proper advocacy, a number of state supreme courts have even published what are referred to in the literature as 'teaching opinions', which review the rationale for independent state constitutional grounds." *Id*., at 816 (citations omitted).

The proper place for such claims to be heard is in state courts, as many state courts have interpreted their constitutions to offer greater protections to their citizens than are offered under the federal constitution. Helen Gugel, *Remaking the Mold: Pursuing Failure-to-Protect Claims Under State Constitutions Via Analogous Bivens Actions*, 110 Colum. L. Rev. 1294, 1328 (2010). This Court has historically, and in no uncertain terms, demonstrated its dedication to the resolution of constitutional issues presented before it. Iowa's leadership in this respect among the states is widely recognized. The issue presented today involves substantial constitutional rights of the highest order. The Iowa Constitution as an

independent source of redress for citizens whose rights are violated by government actors goes to the very essence of constitutional interpretation. The Iowa Supreme Court is the one and only tribunal that can hear and resolve this issue definitively. The district court realistically had no other choice but to dismiss Plaintiff's claims in light of the absence of an Iowa Supreme Court decision on this issue. The lower courts and Iowa's citizens await this Court's guidance.

D. PRIOR IOWA JURISPRUDENCE DOES NOT IMPEDE, AND IN FACT SUPPORTS, RECOGNIZING A PRIVATE CAUSE OF ACTION FOR DAMAGES UNDER THE IOWA CONSTITUTION

1. Preservation of Error

On April 23, 2015, Plaintiff filed a timely application for interlocutory review in accordance with Iowa Rule of Appellate Procedure 6.104. (4/23/15 Application for Review). On May 28, 2015, this Court granted Plaintiff's application. (5/28/15 Supreme Court Order, App. 170).

2. Scope of Review

Appellate courts review constitutional claims de novo. *State v. Harris*, 741 N.W.2d 1, 4 (Iowa 2007).

3. Argument

a. Historical Iowa Case Law Supports Recognizing a Private Cause of Action for Damages Under the Iowa Constitution

Historical Iowa case law indicates that the concept of a private cause of action for damages under the Iowa Constitution is not new and, in fact, has been specifically acknowledged by this Court.[19] In *Girard v. Anderson*, 219 Iowa 142, 257 N.W. 400, 403 (1934), the Iowa Supreme Court found that "[a] violation of the state and federal constitutional provisions against the unreasonable invasion of a person's home gives the injured party a right of action for damages for unlawful breaking and entering. *Id*., citing *McClurg v. Brenton, et al.*, 123 Iowa 368, 98 N.W. 881, 882 (1904); *Krehbiel v. Henkle*, 152 Iowa 604, 129 N.W. 945 (1909) (plaintiff could recover exemplary damages for wrongful invasion of his home in search of stolen property if act proven to be wanton and reckless and in disregard of his rights).

The *Girard* case involved a piano merchant, whose employees forcibly and without process of law entered the home of the plaintiff to

[19] While the Iowa Court of Appeals indicated in a *Conklin* footnote that it did not agree that the *Girard* opinion implied a remedy for a violation of the Iowa Constitution against the State, this Court is not bound by such dicta. *Conklin v. State*, 2015 WL 1332003 (Iowa Ct. App.).

reclaim the piano after the plaintiff missed a payment. *Girard*, 257 N.W. 400, 401 (Iowa 1934). The merchant's employees acted in accordance with a contract signed by the parties which provided that in case of payment default, the merchant had a legal right to enter the premises and take possession of the piano. *Id*., at 400. The Court found that the petition not only supported causes of action for both trespass and conversion, but that the plaintiff had a right of action pursuant to the Iowa Constitution. The Court discussed the importance of Article I, Section 8 of the Iowa Constitution which holds, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated." Iowa Const., art. I, § 8. The Court found that the sales contract violated public policy and that such agreements in violation of constitutional provisions were invalid. *Id*., at 403. The Court went on to unequivocally employ its judicial power to recognize a damages cause of action under our state constitution for the violation of this provision. Such a conclusion supports not only the self-executing nature of the constitutional provision, but the stark absence of a need for legislative action in order to trigger the constitutional protection.

In *McClurge*, the plaintiff brought an action to recover damage for an alleged unlawful search of his premises. *McClurge*, 123 Iowa 368, 98 N.W. 881 (1904). In reversing the trial court's verdict for the defendants, the Iowa Supreme Court described the ultimate importance of a citizen's constitutional right to be free from unlawful searches. In the colorful prose of the period the Court declared:

> "The right of the citizen to occupy and enjoy his home, however mean or humble, free from arbitrary invasion and search, as for centuries been protected with the most solicitous care by every court in the English-speaking world, from Magna Carta down to the present, and is embodied in every bill of rights defining the limits of governmental power in our own republic…No amount of incriminating evidence, whatever its source, will supply the place of such a warrant. At the closed door of the home, be it palace or hovel, even bloodhounds must wait till the law, by authoritative process, bids it open."[20]

Id., at 882. The Court held that in addition to actual damages for such an unlawful invasion, the plaintiff also might recover punitive damages should

[20] The unlawful search unfolded thus: "[D]ogs were taken to the premises of the person who claimed to have lost the chickens, and there turned loose for a trial of their detective skill. Following their lead, as is claimed, the mayor's forces came to the home of the plaintiff, who, unsuspicious of this canine impeachment of his good name and fame, had retired with his family for the night. The mayor and captain of the night force advanced to the door, gave the alarm in due form, and demanded entrance…the door was forced open against the resistance of the plaintiff…the poker was forcibly wrested from plaintiff's hands, and…when one of the sons attempted to hand the key of the chicken house to his father, one of the mayor's party unceremoniously took possession of it, and thereby gained entrance to the chicken house." *Id*., at 882.

malice or bad faith be proven. *Id*., at 883. ("If the jury should find for plaintiff – that the wrongful search was made, and that in such act the defendants were moved or inspired by malice toward the plaintiff – [the jury] could, in addition to actual damages, assess a greater or less sum against the defendants by way of punishment or as exemplary damages.").

b. The Holding in *Conklin v. State* Poses No Obstacle to the Ability of This Court to Recognize a Private Cause of Action for Damages Under the Iowa Constitution

In *Conklin v. State*, the recent case to which the district court cited in its decision from which this appeal originates, the Iowa Court of Appeals declined to "judicially imply a remedy for a violation of the Iowa Constitution." *Id.*, No. 14-0764, 2015 WL 1332003, at *1 (Iowa Ct. App., Mar. 25, 2015) (unpublished). *Conklin* involved a plaintiff who alleged a violation of his parental rights under the Iowa Constitution, when the state issued a no-bail warrant for his arrest during a pending child-in-need-of-assistance (CINA) proceeding. *Id.* at *2. The Court of Appeals reasoned that, based on the availability of a federal section 1983 action, implying a private cause of action under these facts was inappropriate. *Id.* at *5. Further, the court noted that "several of our sister states, whose constitutions have similar language to that found in article XII, have also declined to

imply a private cause of action for a violation of their state constitutions," *Id.*, at *3, and stated that it found Michigan's separation-of-powers argument to be particularly persuasive. *Id.*, at *3–4. Unfortunately, the Court of Appeals failed to acknowledge that many more states with constitutional provisions similar to Iowa's *have* recognized private causes of action for violations of their state constitutions. *Id.*, at *3.

The court also concluded that "recent case law has indicated that the Supreme Court is moving away from the holding in *Bivens* . . . [by] declining to imply remedies for constitutional violations in the absence of a statute. *Id.*, at *4. However, even though the Court has chipped away at the decision, *Bivens* has not been overturned, and the doctrines behind it have actually inspired greater protections of Constitutional rights in many states. Also, decisions made by the Iowa Court of Appeals are certainly not binding precedent upon the Supreme Court of Iowa, as the district court in this case acknowledged.

The *Conklin* plaintiff alleged that, due to the state issuing a no-bail warrant for his arrest during pending child-in-need-of-assistance (CINA) proceedings involving his four sons, the violation of his parental rights amounted to a violation of his constitutional rights under the Iowa

Constitution and the U.S. Constitution. *Id.*, at *2. The Court of Appeals reasoned that, based on the availability of a federal section 1983 action, implying a private cause of action under these facts was inappropriate. *Id.*, at *5. Moreover, multiple statutes govern CINA proceedings, as well as the setting of bail, which are not at issue in the present case.

Additionally, the *Conklin* case itself involves a factually different set of circumstances, namely that the *Conklin* plaintiff's causes of action stemmed from a warrant for his arrest issued during a child-in-need-of-assistance proceeding and the termination of his parental rights to his minor children. *Id.*, at *1. Moreover, his constitutional allegations, while many and varied, did not include due process or equal protection issues.[21]

Another important distinction is that the *Conklin* plaintiff brought all but one of his causes of action under both the United States Constitution, as well as the Iowa Constitution, thus availing him of redress through § 1983.

[21] The *Conklin* plaintiff alleged as follows: (1) violation of the right to bail and access to surety, as guaranteed by Article I, § 12 of the Iowa Constitution; (2) violation of the right to be free from excessive bail, as guaranteed by Article I, § 17 of the Iowa Constitution and the Eighth Amendment to the United States Constitution; (3) violation of the right of the natural parent to the care, custody, and management of children and the right to liberty and familial association as guaranteed by Article I, § 1 of the Iowa Constitution and the Fourteenth and Ninth Amendments to the United States Constitution; (4) violation of the right to be free from unreasonable seizure as guaranteed by Article I, § 8 of the Iowa Constitution and the Fourth Amendment to the United States Constitution.

Id., at *5. The Court found the availability of such claims, coupled with the *Bivens* line of case law, were "special factors counseling hesitation" for allowing the claims to move forward pursuant to the Iowa Constitution. *Id.* In the final analysis, the Court was simply not compelled to imply a judicial remedy under the Iowa Constitution, based on the unique facts and legal underpinnings involved in that case.

There is no such intersection of state and federal constitutional issues in the case at bar, however, as Plaintiff has pled only Iowa Constitution – not U.S. Constitution - violations. No federal constitutional violations have been alleged, therefore unlike in *Conklin*, no federal remedy applies. For this reason, coupled with the additional distinguishing features previously discussed, the decision in the *Conklin* case should not govern the outcome in this case and the *Conklin* decision should not prevent the court from Court finding a private cause of action for damages pursuant to the Iowa Constitution.

IX. CONCLUSION

For all of these reasons, Plaintiff strongly urges this Court to find that the District Court erred in granting Defendants' Motion for Partial Summary Judgment with respect to Counts VI through IX and to further find that a

private cause of action for damages exists pursuant to the Iowa Constitution when a citizen's constitutional due process and equal protection rights as secured by the Iowa Constitution are violated by state actors and further that the rights available under the Iowa Constitution are not cancelled if another statutory or common law cause of action exists.

X. REQUEST FOR ORAL ARGUMENT

Plaintiff hereby requests oral argument.

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